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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1350

UNITED ORDER OF AMERICAN BRICKLAYERS AND STONE MASONS, LOCAL 21, *Petitioner*

v.

WILLIAM A. WATERS AND DONALD SAMUELS, AND WISCONSIN STEEL WORKS OF INTERNATIONAL HARVESTER COMPANY, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY MEMORANDUM

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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In the union's opposition to the plaintiffs' petition for certiorari in No. 74-1064 (Pl. Pet.) we demonstrated that none of the Questions Presented by the plaintiffs' petition arises on this record (Un. Opp. 5-9). Perhaps on the theory that turnabout is fair play, plaintiffs argue that the second and third questions raised by the union's petition do not arise. (Pl. Opp. 2-3). Since we do not seek to prolong this litigation if the plaintiffs' petition for certiorari is denied (Un.

Pet. 14-15), a standoff would be entirely satisfactory to us. Nevertheless, although it should be academic, we shall show that the union's second and third questions are indeed properly here.

A. The critical element of our Question 2 is that the black worker who was granted recall preference by the Court (here, plaintiff Waters) "had not been discriminated against in hire". Neither the "finding" which plaintiffs emphasize (Pl. Opp. 2-3), nor anything else in the Court of Appeals' opinion states or even hints that Waters *had* been discriminated against in hire. While plaintiffs did so assert in their Petition for Certiorari in No. 74-1064, the briefs in opposition therein refuted this claim so thoroughly that plaintiffs did not have the temerity to renew it in their reply in that case.[1] Nor, despite their general denial that the issue raised in Question 2 arises on this record, do plaintiffs in their opposition assert that Waters had

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[1] The closest that plaintiffs came to meeting this issue in that reply was a desperately contrived charge of inconsistency:

> "In opposing Waters' Petition for Writ of Certiorari in this case, No. 74-1064, the union asserts the Seventh Circuit did not hold that respondents had discriminated against Waters. * * * In seeking Certiorari regarding other aspects of this case, the union takes the opposite position and asserts the Court of Appeals *did* conclude that plaintiff Waters was discriminated against." (Pl. Rep. No. 74-1064, p. 4, emphasis in original.)

This incomplete and therefore grossly misleading statement of our position conceals the fact that our submissions accurately describe the Seventh Circuit's holdings with respect to *two different* forms of discrimination: In opposing certiorari in No. 74-1064, we asserted (pp. 2-4, 6, 8, n. 11) that the Seventh Circuit did not hold that respondents had discriminated against Waters *in hire;* in our Petition in No. 74-1350 we assert (pp. 2, 9-11, 18-20) that the Court of Appeals *did* conclude that plaintiff Waters was discriminated against *in recall.*

been discriminated against in hire, and of course they present no record support for such an allegation. The conclusion is inescapable that Question 2 *is* squarely presented on this record.

The Court of Appeals' finding on which plaintiffs rely, that the amendment to the earlier severance pay agreement "plac[ed] those white bricklayers ahead of black bricklayers" was not "overlook[ed]" by our petition; on the contrary, the very issue raised is whether that finding is sufficient as a matter of law to establish a violation in refusing to recall a black bricklayer who was not himself the victim of discrimination in hire.

Our interpretation of 42 U.S.C. § 1981 has now received the support of the Fifth Circuit in *Watkins* v. *United Steelworkers, etc.*, 10 FEP Cases 1297 (July 16, 1975), *reversing* 369 F.Supp. 1221 (E.D.La.) on which plaintiffs had relied in *their* Petition, pp. 14, 17, 19, n. 22. The Fifth Circuit ruled in *Watkins* that black workers who have not themselves been discriminated against in hire are not entitled to preference over white employees either with respect to protection from layoff or with respect to recall, even where the employer had discriminated against blacks in hiring before 1965, when the 1964 Civil Rights Act became effective. In so ruling, the Court of Appeals approved and followed the decision of the Seventh Circuit in this case insofar as it rejected the claims of Waters and Samuels (which are the subject of No. 74-1064) and of the Sixth Circuit in *Long* v. *Ford Motor Co.*, 496 F.2d 500, on which we rely, see Pet. 19-20 herein. 10 FEP Cases at 1304. The *Watkins* Court also declared that the Seventh Circuit's decision in Waters' favor (which is the subject of the union's petition) is "different factually" from

Watkins.[2] So, indeed it is. The decision that Waters' rights under § 1981 had been violated cannot be reconciled in principle with the holdings of *Watkins* and *Long*.

B. We fully agree with plaintiffs that a party may not raise in a Petition for Certiorari an issue which it did not present to the courts below. However, as plaintiffs' own description of the proceedings below demonstrates (Pl. Opp. 3-4), the union did at all times raise and preserve its position reasserted in Question 3 here, that it may not be found jointly liable with the employer, because if Waters' rights under 42 U.S.C. § 1981 were violated, the fault was exclusively that of the company (see Un. Pet. 20-22).

The Fourth Circuit in *Barnett* v. *W. T. Grant*, F.2d , 10 FEP Cases 1057, cited at Pet. Opp. 4, has now joined the Fifth Circuit (see Un. Pet. 20-21) in holding that the union's monetary liability does not flow automatically from the fact that it was signatory to a contractual provision which was held to result in a violation of § 1981. In *Barnett* the defendants' sole monetary liability was for costs and reasonable counsel fees, see *id.* at 1062-1063. The Court said:

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[2] The Court said:

> "As to the argument of plaintiffs that seniority as a basis of recall violates Title VII where it 'locks in' past discrimination, the Waters case is different factually from the case *sub judice* by the presence of the *discriminatory* amendment to the collective bargaining agreement." (*Id.*, emphasis supplied.)

In order to decide the case before it the Fifth Circuit had no need to examine critically the Seventh Circuit's characterization of the challenged amendment to the recall agreement as "discriminatory". But while that agreement created a preference for one group over another and in that sense discriminated between them, the preference was not based on race and therefore not "discriminatory" in an invidious or statutorily prescribed sense.

> "These may be taxed against defendant W. T. Grant Company *and/or* against International Brotherhood of Teamsters and Teamsters Local 71, and may be allocated among the defendants in such proportions as to the district court may seem just and proper." (*Id.* at 1063, emphasis added.)

The Fourth Circuit thus required the District Court to determine the proportions that each defendant was to pay, specifically leaving open (by use of "or") the possibility that the "proportion" allocable to a particular defendant would be zero. *That* is our contention with respect to the union here.[3] Similarly, in *Guerra* v. *Manchester Corp.*, 498 F.2d 641, 645, n. 3, 655-656, the Fifth Circuit approved a district court's order which imposed the full burden of payment on the union because it had been "the primary source of the stimulus that provoked [the plaintiff's] illegal transfer" under a union operated hiring hall. See *id.* at 656.

II

A. The decision of this Court in *Johnson* v. *Railway Express Agency, Inc.*, 95 S.Ct. 1716, that 42 U.S.C.

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[3] Plaintiffs' dismissal of the problem by saying that an "apportionment of liability was within the discretion of the trial judge" (Pl. Opp. 4) overlooks *Albemarle Paper Co.* v. *Moody*, 95 S.Ct. 2362, where this Court rejected the petitioners' contention "that the statutory scheme provides no guidance, beyond indicating that back pay awards are within the District Court's discretion." (Id. at 2370.) So here the question whether back pay should be awarded against a *particular* defendant is, as the Fourth and Fifth Circuits have recognized, a "discretionary choice [which] is not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles'." (*id.* at 2362, quoting *United States* v. *Burr*, 25 Fed. Cas. No. 14, 692d, pp. 30, 35 (Marshall, C.J.). The "sound legal principles" governing the basis of liability between defendants should be established by this Court.

§ 1981 prohibits "racial discrimination in the making and enforcement of contracts" of employment (*id.* at 1720) answers the first part of Question 1 presented by our Petition. But this leaves open, and indeed brings to the forefront of litigation under § 1981, the second part of that question: "If so, does it prohibit discriminatory practices other than the refusal to hire on the basis of race?" That question has not even been considered by the courts of appeals whose views of § 1981 were approved in *Johnson,* and cannot be decided in favor of coverage on the basis of the "make and enforce" language of § 1981 or the generative analogy of *Jones* v. *Mayer,* 392 U.S. 409. See Un. Pet. 17, which plaintiffs studiously ignore.[4]

B. The holding of the Court in *Johnson* that "the controlling statute of limitations of actions brought under § 1981 is 'the most appropriate one provided by state law'" (Pl. Opp. 4, quoting 95 S.Ct. at 1721) leaves unresolved the issue presented by our Question 4, which is how the courts are to ascertain *which* statute *is* "the most appropriate one". That is, of course, a federal question (42 U.S.C. § 1988, quoted in *Johnson,*

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[4] We note also that even the portion of *Johnson* on which plaintiffs rely (Pl. Opp. 2) "lacks the precedential weight of a case involving a truly adversary controversy" (*Bob Jones University* v. *Simon,* 416 U.S. 725, 740, n. 11) because none of the parties in *Johnson* questioned the applicability of § 1981 to employment contracts. Given the unanimity of the Court of Appeals' decisions the respondents in *Johnson* understandably opted to embrace their holding that § 1981 is applicable but provides an entirely separate statutory remedy from Title VII, so that the invocation of the latter does not toll the limitations period under § 1981. See particularly Brief for Respondents Brotherhood, etc., No. 73-1543, pp. 15-16; Brief for Respondent REA Express, Inc., *id.*, p. 9; Reply Brief for REA Express, Inc., *id.* pp. 3-6. While that approach was vindicated by the outcome (see particularly parts III and IVC of the *Johnson* opinion) it deprived this Court of the benefits of the full presentation which such an issue merits. See Un. Pet. 15-16.

95 S.Ct. at 1722, n. 10), but it is one as to which the decisions in the circuits are in total disarray, see Un. Pet. 23-25. While absolute identity in result is, as we acknowledged (Pet. 25, n. 16), beyond reach since the number of years of the limitations period will necessarily differ from state to state, uniformity in method —*i.e.*, in identifying the "appropriate" state statute— is obviously desirable and readily attainable. For example, a holding that the courts should borrow an available state limitations statute governing civil rights claims (as the Sixth Circuit has held and as we unsuccessfully urged below) would be dispositive in the majority of states which allow claims for civil rights violations.[5]

CONCLUSION

For the foregoing reasons and those stated in our petition in No. 74-1350 petition for certiorari should be granted if certiorari is granted in No. 74-1064.

Respectfully submitted,

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[5] So too, a holding that the residual (or "catch-all") statute should be utilized (as the Seventh Circuit held here) would resolve all cases, while a holding that it is not "appropriate" would at the least make clear to the lower courts that they must identify the specific analogous state statute.